

**SOME BASIC STUFF  
AGENCY ATTORNEYS  
SHOULD KNOW ABOUT  
EMPLOYMENT LAW &  
HUMAN RESOURCES**

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**EMPLOYMENT AT WILL**



Common Law Exceptions  
Statutory Exceptions  
Constitutional Exceptions

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**A PROPERTY INTEREST IN  
CONTINUED EMPLOYMENT**



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### A PROPERTY INTEREST IN CONTINUED EMPLOYMENT



Dismissal subject to due process requirements, if property rights conferred by statute or personnel ordinance.

- *Bd. of Regents v. Roth*, 408 U.S. 564 (1972);
- *Loudermill*, 470 U.S. 532 (1985);
- *Pittman v. Wilson County*, 839 F.2d 225 (4th Cir. 1988);
- *Howell v. Town of Carolina Beach*, 106 N.C. App. 410 (1992).

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### CHAPTER 126: THE STATE HUMAN RESOURCES ACT

- Exempt managerial position. - A position delegated with significant managerial or programmatic responsibility that is essential to the successful operation of a State department, agency, or division, so that the application of G.S. 126-35 to an employee in the position would cause undue disruption to the operations of the agency, department, institution, or division.
- Exempt policymaking position. - A position delegated with the authority to impose the final decision as to a settled course of action to be followed within a department, agency, or division, so that a loyalty to the Governor or other elected department head in their respective offices is reasonably necessary to implement the policies of their offices. The term does not include personnel professionals.
- Personnel professional. - Any employee in a State department, agency, institution, or division whose primary job duties involve administrative personnel and human resources functions for that State department, agency, institution, or division.

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### JUST CAUSE

### NOTICE AND AN OPPORTUNITY TO BE HEARD

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**The Fourteenth Amendment  
Liberty Interest and  
Public Employment**

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**The 14<sup>th</sup> Amendment's Liberty Interest and the Name-Clearing Hearing**

1. "Liberty" includes the right "to engage in the common occupations of life, unfettered by unreasonable restrictions" imposed by the government.
2. That right is abridged when the government "unfairly imposes some **stigma** or disability that will itself foreclose the freedom to take advantage of employment opportunities."

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**Due Process is Required**

When the government's statements about an employee:

- places a **stigma** on the employee's reputation, and
- are made **public** by the employer, and
- are made in conjunction with the employee's termination or demotion, and
- are false or are contested by the employee.

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**Public Information – GS 126-23**

11. Date and type of each dismissal, suspension, or demotion for disciplinary reasons . . . . If the disciplinary action was a dismissal, **a copy of the written notice of the final decision** of the head of the department setting forth the specific acts or omissions that are the basis of the dismissal.

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**Stigma**

Statements that impugn an employee's

**ethics**  
**honesty**  
or  
**morals**

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Statements about an employee's performance,  
knowledge, skills or abilities ≠ Stigma

Mere fact of termination or demotion ≠ Stigma

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**PUBLIC**

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**Due Process**

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A hearing

- a. Before or after termination or demotion
- b. **Before publication**

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**The First Amendment in the Age of Social Media**



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Would the First Amendment protect Jon Scheyer if Duke fired him for wearing a button on game day supporting unionization for college basketball players?



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Would the First Amendment protect Hubert Davis if UNC fired him for wearing a button on game day supporting unionization for college basketball players?



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**1. The First Amendment protects public employees when they speak as *citizens* on matters of public concern.**

**2. The First Amendment does not protect public employees when they speak as *employees of a government employer*.**

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**Threshold Question**

**Was the employee's speech made as part of his or her regular job duties?**

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**Speaking As An Employee**

- Unpopular work policies
- Complaints of abuse or unfair treatment by a supervisor
- Complaints about a supervisor's conduct or performance
- Gossip about elected officials

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**Courtroom testimony**  
**At a press conference**

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**The *Pickering* Balancing Test** 

If the speech is not made as part of her regular job duties, apply the two-part test:

1. Is the speech on a matter of public concern?
2. If so, whose interests are greater – the employee's or the employer's?

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Marshall is  
Mayor and  
Alderman  
of the  
City of  
Savannah,  
Georgia.  
2010 WL  
527852  
(11<sup>th</sup> Cir.  
2010)

*Hi, I'm Tiffany and I'm a firefighter with Savannah Fire and Rescue.*

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**Laura Miller, EMT**

On Facebook:

"What a day! Had to assist and move an obese, menopausal looney-tunes! Literally a 234, as it turns out. In a fit of paranoid delusion, the b---- tried to strike her husband with a fireplace poker, but slipped and broke her hip instead. I thought she was going to attack the ER receiving team and then, when the ER receiving team got a look at her, I thought they were going to kill us!"

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Would the First Amendment protect Hubert Davis if UNC fired him for wearing a button supporting unionization of college basketball players?



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The 4th Amendment's Limits on Drug Testing of Public Employees

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The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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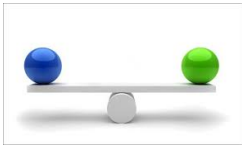
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### The "Special Needs" Warrantless Search



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Reasonable, individualized suspicion  
of  
workplace misconduct or illegal behavior

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**Drug testing is  
a search  
within the meaning of the 4<sup>th</sup> Amendment**

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**Reasonable Suspicion Must Be  
Based on *Specific Objective Facts***

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**1. Direct observations of  
drug use or possession**



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**HELLO I AM... RELIABLE**



**2. Report of observed drug use by a reliable and credible source**

**HELLO I AM... DEPENDABLE**



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**3. Direct observation of the physical symptoms of being under the influence of drugs**



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**4. A pattern of abnormal conduct or erratic behavior**



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5. Arrest or conviction  
for a drug-related  
offense



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6. On-the-job accident where evidence  
indicates drug use played a role.



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7. Evidence that  
employee  
tampered with a  
previous drug test



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**RANDOM DRUG TESTING**

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**Employees in safety-sensitive positions  
may be subject to random drug testing.**

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**No one else.**

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**What Is a Safety-Sensitive Position?**

Focus on the immediacy of the threat posed by a potential drug-induced mistake or failure in the performance of the employee's job duties.

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**What Is a Safety-Sensitive Position?**

One in which the duties involve "such a great risk of injury to others that even a momentary lapse of attention can have disastrous consequences."

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**Pre-employment Drug Testing**

Permissible

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